ALASKA STATE LEGISLATURE
HOUSE STATE AFFAIRS STANDING COMMITTEE
April 20, 2021
3:05 p.m.

DRAFT

MEMBERS PRESENT

Representative Jonathan Kreiss-Tomkins, Chair
Representative Matt Claman, Vice Chair
Representative Geran Tarr
Representative Andi Story
Representative Sarah Vance
Representative James Kaufman
Representative David Eastman

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

CONFIRMATION HEARING

Commissioner, Department of Public Safety

James Cockrell - Soldotna

- HEARD

HOUSE JOINT RESOLUTION NO. 7
Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund, appropriations from the permanent fund, and the permanent fund dividend.

- HEARD & HELD

HOUSE BILL NO. 73
"An Act relating to use of income of the Alaska permanent fund; relating to the amount of the permanent fund dividend; relating to the duties of the commissioner of revenue; relating to an advisory vote on the permanent fund; providing for an effective date by repealing the effective date of sec. 8, ch. 16, SLA 2018; and providing for an effective date."

- HEARD & HELD

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 5
"An Act relating to sexual abuse of a minor; relating to sexual assault; relating to the code of military justice; relating to consent; relating to the testing of sexual assault examination kits; and providing for an effective date."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HJR 7
SHORT TITLE: CONST. AM: PERM FUND & PFDS
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/18/21	(H)	READ THE FIRST TIME - REFERRALS
02/18/21	(H)	STA, JUD, FIN
04/20/21	(H)	STA AT 3:00 PM GRUENBERG 120

BILL: HB 73
SHORT TITLE: PERM FUND; ADVISORY VOTE
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

02/18/21	(H)	READ THE FIRST TIME - REFERRALS
02/18/21	(H)	STA, JUD, FIN
04/20/21	(H)	STA AT 3:00 PM GRUENBERG 120

BILL: HB 5
SHORT TITLE: SEXUAL ASSAULT; DEF. OF "CONSENT"
SPONSOR(s): TARR

02/18/21	(H)	PREFILE RELEASED 1/8/21
02/18/21	(H)	READ THE FIRST TIME - REFERRALS
02/18/21	(H)	STA, JUD
03/26/21	(H)	SPONSOR SUBSTITUTE INTRODUCED
03/26/21	(H)	READ THE FIRST TIME - REFERRALS
03/26/21	(H)	STA, JUD
03/27/21	(H)	STA AT 1:00 PM GRUENBERG 120
03/27/21	(H)	Heard & Held
03/27/21	(H)	MINUTE(STA)
04/13/21	(H)	STA AT 3:00 PM GRUENBERG 120
04/13/21	(H)	Heard & Held
04/13/21	(H)	MINUTE(STA)
04/20/21	(H)	STA AT 3:00 PM GRUENBERG 120

WITNESS REGISTER

JAMES COCKRELL, Commissioner Designee
Department of Public Safety
Juneau, Alaska
POSITION STATEMENT: Speaking as the commissioner designee to the Department of Public Safety, provided his qualifications and answered questions.

BRIAN BREFCZYNSKI
Office of the Governor
Juneau, Alaska
POSITION STATEMENT: During the hearing on HJR 7 and HB 73, provided introductory remarks on behalf of the House Rules Standing Committee, sponsor by request of the governor.

MIKE BARNHILL, Deputy Commissioner
Department of Revenue
Juneau, Alaska
POSITION STATEMENT: Provided a PowerPoint presentation, titled "HJR 7: Amending Constitution re Permanent Fund; HB 73: statutory 50/50 PFD Formula."

BILL MILKS, Assistant Attorney General
Department of Law
Juneau, Alaska
POSITION STATEMENT: During the hearing on HJR 7 and HB 73, answered questions.

JOHN SKIDMORE, Deputy Attorney General
Office of the Attorney General
Department of Law
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 5, answered questions.

JAMES STINSON, Director
Office of Public Advocacy
Department of Administration
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 5, answered questions.

RENEE MCFARLAND, Deputy Public Defender
Public Defender Agency
Department of Administration
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 5, answered questions.

NANCY MEADE, General Counsel
Office of the Administrative Director
Alaska Court System
Anchorage, Alaska
POSITION STATEMENT: During the hearing on HB 5, answered questions.

ACTION NARRATIVE

3:05:16 PM

CHAIR JONATHAN KREISS-TOMKINS called the House State Affairs Standing Committee meeting to order at 3:05 p.m. Representatives Tarr, Story, Claman, Kaufman, and Kreiss-Tomkins were present at the call to order. Representatives Vance and Eastman arrived as the meeting was in progress.

CONFIRMATION HEARING
Department of Public Safety, Commissioner

3:08:52 PM

CHAIR KREISS-TOMKINS announced that the first order of business would be a confirmation hearing for Commissioner Designee James Cockrell, Department of Public Safety (DPS).

3:09:06 PM

JAMES COCKRELL, Commissioner Designee, Department of Public Safety, introduced himself and detailed his family history in Alaska, as well as his education through college. He discussed his background in public safety, beginning in 1983 in the Alaska Wildlife Troopers (AWT) Division. He reported being stationed in various locations throughout Alaska, eventually ending up in Anchorage at command level. From there, he became a major with AWT, transitioned to the Division of Alaska State Troopers (AST), retired, and came back as a patrol trooper to provide law enforcement services throughout the Kenai Peninsula. After another short stint in retirement, he was asked to return as the colonel for AWT to restructure the aircraft section and interface with the National Transportation Safety Board (NTSB) during the investigation into a plane crash in Talkeetna that killed three people. He noted that he was eventually the colonel of both divisions [AST and Wildlife Troopers] before retiring in 2017. After that, he worked as the security manager

for Marathon petroleum. He explained that when the vacancy in DPS became available several months ago, several respected department members asked him to come back, which spurred his interest in returning. He said he ultimately returned because he felt that he could make a positive difference in DPS and for Alaskans.

3:14:07 PM

COMMISSIONER DESIGNEE COCKRELL outlined his top priorities for DPS. Firstly, he said he wanted to bring stability to the department, adding that he was "thrilled" with its current colonels and directors. He conveyed his desire to meet the needs of the department in a professional manner. He noted that he had no intention of tearing down the department and rebuilding it; however, he would make "course corrections" as he saw fit. His second priority was to address rural law enforcement and support the Village Public Safety Officer (VPSO) program. He acknowledged that AST could not meet its mission's needs without VPSOs in the villages. Thirdly, he said he would prioritize sexual assault and domestic violence. He indicated that he wanted to reduce the prevalence of both, as Alaska lead the nation in high rates of domestic violence and sexual assault. He concluded that the department needed to find better ways to protect young Alaskans especially in rural areas. He also touched on the issues with retention and recruitment within DPS. He explained that the department was struggling to keep an adequate number of troopers in the field. He reported that there were currently 44 vacant trooper positions in the AST division, which he characterized as "unacceptable."

3:20:05 PM

CHAIR KREISS-TOMKINS summarized Commissioner Designee Cockrell's priorities as follows: agency stability, rural law enforcement, reducing domestic violence/sexual assault, and retention. He invited questions from committee members.

3:20:30 PM

REPRESENTATIVE STORY questioned how the department would address the backlog of rape kits that had gone untested. Additionally, she reported that although DNA swabs were statutorily required, they were not being used consistently. She asked how the commissioner designee would attend to that.

COMMISSIONER DESIGNEE COCKRELL said the issue had been brought to his attention in the last several weeks. He believed that some police departments expected DOC to handle the DNA swabs. He stated that DPS would have to do better, which meant training and educating troopers to follow the statutory requirements.

REPRESENTATIVE STORY opined that it should be a "day-one priority." She said she was a surprised to learn that there was no system in place [regarding DNA swabs] and believed it was critically important that one be implemented.

COMMISSIONER DESIGNEE COCKRELL assured Representative Story that it would be prioritized, especially in association with domestic violence and sexual assault.

3:23:09 PM

REPRESENTATIVE TARR indicated that she was pleased with the commissioner designee's priorities for DPS. She pointed out that there was no statutory requirement for the ongoing education or training of public safety professionals. She questioned whether that should be considered if it could be properly funded. She provided the example of requiring annual training on newly enacted laws to ensure that troopers were knowledgeable about DNA swabs.

COMMISSIONER DESIGNEE COCKRELL acknowledged the importance of training officers, especially on current medical trends. He believed the more training the better. He explained that the issue was the cost of training, as that was usually the first thing to go during budget cuts. Additionally, with the shortage of officers in the field, he said it was hard to encourage commanders to send them to a several-week training at the academy in Sitka. He noted that in-service training on domestic violence and sexual assault was required every two years. He was unsure whether passing a statute [that required ongoing training] would make a difference due to the associated costs and components, which he proceeded to list. He maintained that he was supportive of training, as it helped victims and reduced the department's liability. He stated his interest in ensuring that every case was investigated thoroughly, properly documented, and correctly presented to the DA.

3:27:27 PM

REPRESENTATIVE TARR asked the commissioner designee to comment on rural law enforcement, sexual abuse of a minor statutes, and capacity issues.

COMMISSIONER DESIGNEE COCKRELL pointed out that cases involving sexual abuse of a minor were not contained to rural Alaska. In addition to catching the perpetrator, he emphasized the importance treating victims' trauma and believed that Alaska was lacking in that area. He anecdotally reported that most women had been sexually assaulted before the age of 18 in certain towns in Alaska. He concluded that the state, as a whole, needed to do better.

3:29:07 PM

REPRESENTATIVE CLAMAN, referencing Commissioner Cockrell's resume [included in the committee packet], sought to confirm that he was a Tier 1 employee.

COMMISSIONER DESIGNEE COCKRELL answered yes.

REPRESENTATIVE CLAMAN questioned how a lack of pensions affected recruitment.

COMMISSIONER DESIGNEE COCKRELL believed that a retirement system with defined benefits was crucial to Alaska law enforcement. He alleged that all officers experienced a "dark side" during his/her career and that a retirement system was what kept employees engaged, as they worked towards a foreseeable end goal. He opined that returning to a pension was critical and even more important than wages.

REPRESENTATIVE CLAMAN asked whether the lack of a pension was a factor in losing troopers to other states.

COMMISSIONER DESIGNEE COCKRELL recalled losing several troopers to the King County Sheriff's Office. He explained that after five years, the troopers would collect their 401(K) in addition to money matched by the state and leave. He said that Alaska was essentially a training ground for several western police departments.

REPRESENTATIVE CLAMAN questioned how troopers could help reduce the number of declined sexual assault cases.

COMMISSIONER DESIGNEE COCKRELL mentioned a UA study from 2014 that tracked sexual assault and domestic violence cases. He

indicated that the quality of investigation increased the chances of getting a conviction or prosecution. He stressed the importance of performing quality investigations, noting that there was a quality control system for domestic violence and sexual assault. Additionally, he believed it was crucial for victims to be engaged. To that end, he said DPS was looking into interfacing victims with advocates so that they would not get lost in the system.

3:35:24 PM

REPRESENTATIVE CLAMAN asked whether increasing the number of troopers for that specific reason would improve the quality of investigation or if that would be addressed by more successful recruitment in general.

COMMISSIONER DESIGNEE COCKRELL stated that more troopers were needed. He explained that different options were being considered [to address sexual assault and domestic violence], including an investigative unit in Western Alaska that would handle serious violence crimes, such as homicide and sexual assault. He indicated that ultimately, investigations were reliant on the individual officers and consistent methods.

REPRESENTATIVE CLAMAN inquired about the ideal number of VPSOs for the program to work effectively.

COMMISSIONER DESIGNEE COCKRELL suggested that 100 would be sustainable.

REPRESENTATIVE CLAMAN asked what lessons could be learned in Alaska from George Floyd and the successful prosecution of Derek Chauvin [State of Minnesota v. Derek Chauvin].

COMMISSIONER DESIGNEE COCKRELL opined that Alaska State Troopers had been successful because of how they treated people. He went on to say that troopers treated people differently than other law enforcement agencies because typically, they didn't have backup; therefore, troopers' biggest tool was their voices as opposed to a firearm or baton. He anecdotally reported that he had been able to diffuse stressful situations by talking instead of using force. Nonetheless, he believed that responding to situations without backup was risky for both the officers and the public.

3:41:17 PM

REPRESENTATIVE CLAMAN said statistics indicated that Native and minority populations were overrepresented in Alaska correctional facilities. He expressed concern that increased sentences were disproportionately impacting the most disadvantaged populations and questioned how that situation could be improved.

COMMISSIONER DESIGNEE COCKRELL suggested considering different options. He acknowledged that incarceration had repercussions, especially without the involvement of treatment. He suggested utilizing Tribal resources to "mitigate prison." He relayed that there were mixed feelings within DPS regarding Tribal courts; however, he believed that they could be an option for "minor" misdemeanors and something that should be explored in further detail.

3:43:24 PM

CHAIR KREISS-TOMKINS inquired about the efficacy of the therapeutic court system.

COMMISSIONER DESIGNEE COCKRELL said he didn't have much perspective on it. He opined that with lower-level misdemeanors, anything that could divert a person from going to prison would be beneficial. Further, he pondered whether higher sentences were actually a deterrent for perpetrators of sexual assault.

REPRESENTATIVE TARR clarified that she had hoped to hear more about how the lack of capacity and resources impacted the overall response to crime in rural Alaska.

3:45:36 PM

REPRESENTATIVE EASTMAN asked what benefits were available for the spouse/next of kin when an officer died on duty and whether those benefits were appropriate.

COMMISSIONER DESIGNEE COCKRELL understood that healthcare benefits for a surviving spouse were effective for an additional 10 years; he/she would also receive a full salary until the age of retirement, he believed. He shared a personal anecdote about officers who died in the line of duty. He emphasized his belief that the widow of a fallen officer should be taken care of.

3:48:25 PM

CHAIR KREISS-TOMKINS announced that in deference to the committee agenda, the confirmation hearing would continue at a later date. He expressed his excitement about Commissioner Designee Cockrell's appointment and said he wanted to ensure that all members would have ample time to ask questions and discuss the issues with broader relevance to pieces of legislation and budget items.

3:50:02 PM

The committee took an at-ease from 3:49 p.m. to 3:53 p.m.

^#HJR7
^#HB73

HJR 7-CONST. AM: PERM FUND & PFDS
HB 73-PERM FUND; ADVISORY VOTE

3:53:29 PM

CHAIR KREISS-TOMKINS announced that the next order of business would be HOUSE JOINT RESOLUTION NO. 7 Proposing amendments to the Constitution of the State of Alaska relating to the Alaska permanent fund, appropriations from the permanent fund, and the permanent fund dividend and HOUSE BILL NO. 73 "An Act relating to use of income of the Alaska permanent fund; relating to the amount of the permanent fund dividend; relating to the duties of the commissioner of revenue; relating to an advisory vote on the permanent fund; providing for an effective date by repealing the effective date of sec. 8, ch. 16, SLA 2018; and providing for an effective date."

3:54:03 PM

BRIAN BREFCZYNSKI, Office of the Governor, relayed that securing Alaska's fiscal future was the governor's top priority for the state and its residents. The first step towards achieving that goal, he said, was to protect the Alaska Permanent Fund and ensure the continuation of the Permanent Fund Dividend (PFD) for future generations of Alaskans. He pointed out that after years of Constitutional Budget Reserve (CBR) and Statutory Budget Reserve (SBR) spending, the Earnings Reserve Account (ERA) and its potential depletion was a topic of discussion. He said the governor recognized the risks associated with that conversation and offered this legislation in response. HB 73 would establish a statutory framework to protect the permanent fund and provide for a sustainable annual draw; further, of the amount available for appropriation, fifty percent would be designated for

dividends. He conveyed the governor's belief that the will of the people must be included in this decision; therefore, the proposed constitutional resolution [HJR 7] would require a vote of the people. It would also require that any future change to the dividend formula be approved by the voters. HB 73 would further provide that a statewide election be held to take an advisory vote on whether the statutory changes proposed in the bill were favorable. In closing, he emphasized the governor's desire for the public to be involved in this process of protecting the permanent fund and the dividend.

3:57:20 PM

MIKE BARNHILL, Deputy Commissioner, Department of Revenue, introduced a PowerPoint presentation, titled "HJR 7: Amending Constitution re Permanent Fund; HB 73: statutory 50/50 PFD Formula" [hard copy included in the committee packet]. He began on slide 3, which outlined the objectives of HJR 7: protect the permanent fund; constitutionally protect the PFD; adopt a one account structure; preserve the ERA balance; and engage Alaskans. To protect the fund [first bullet point], he discussed aligning the permanent fund with a traditional endowment fund by implementing management practices that would protect the inflation adjusted value forever, thus balancing the needs of both present and future generations and protecting intergenerational equity. In regard to constitutionally protecting the PFD [second bullet point], the resolution required that a portion of funds withdrawn from the permanent fund would be used for a dividend. He noted that the legislature would control how much of the allocation went towards the PFD. Adopting a one account structure [third bullet point] would be more efficient from an investment perspective, he said, and exhaustion of the fund's income account, the ERA, would be avoided [fourth bullet point]. He explained that for a number of years, the permanent fund's trustees had expressed concern about potentially depleting the ERA. The amount of distribution from the permanent fund for both the dividend and the government spending had increased year over year, which heightened the risk of prematurely exhausting the ERA. He reiterated that transitioning to a one-account structure would eliminate that risk. He reported that engaging Alaskans [fifth bullet point] addressed the governor's desire to constitutionalize the public's role in approving any changes to PFD allocations.

4:01:49 PM

REPRESENTATIVE CLAMAN considered a scenario in which the legislature approved a change to the dividend formula under this proposal, but the voters did not approve the constitutional change. He asked whether the formula change would take effect.

MR. BARNHILL believed that a formula change by the legislature would be effective regardless of whether the constitutional measure was enacted. He explained that an advisory vote did not have legal implications and that a statutory change was still the legislature's responsibility.

REPRESENTATIVE CLAMAN asked whether the advisory vote would be required if the constitutional amendment did get the necessary two-thirds vote in the legislature or was rejected by the voters.

MR. BARNHILL said it would not be required; however, he noted that the advisory vote was a provision in HB 73, so it would be required if the bill were to pass.

4:03:58 PM

CHAIR KREISS-TOMKINS pointed out that slide 3 summarized several points of agreement, including the notion that ad hoc draws were bad; a one-account structure was better than the current two-account structure; and to protect the permanent fund forever for future generations of Alaskans. He asked whether the administration was of the same opinions.

MR. BARNHILL confirmed and expressed appreciation for the chair's acknowledgement. He believed that there were more shared opinions than points of contention, adding that the administration put forward these proposals in an effort to find maximum consensus.

4:05:20 PM

REPRESENTATIVE EASTMAN questioned what "the time of adoption" on page 3, line 8, of HJR 7 referred to.

MR. BARNHILL explained that the constitutional measure required a two-thirds vote by each body of the legislature. It would then be on the ballot for approval by voters at the next general election - the earliest being November 2022. If it were to pass by a majority vote, the measure would take effect 90 days from the date of the election. He further noted that Representative

Eastman was referring to transitional language in Section 3 of HJR 7, which would apply to the FY 24 budget.

4:07:20 PM

BILL MILKS, Assistant Attorney General, Department of Law, directed Representative Eastman to Section 1 of [Article XIII] in the Constitution of the State of Alaska, which specified that a new amendment becomes effective 30 days after certification of the election returns.

REPRESENTATIVE EASTMAN sought verification that an amendment was "adopted" 30 days after the election certification.

MR. MILKS believed it would be reasonable to interpret that an amendment would be adopted when it becomes effective.

REPRESENTATIVE EASTMAN proposed a scenario in which "the legislature were to pass a law ... after the vote but before the amendment [was] effective." He asked whether the amendment would "tie back to" the newly passed legislation or the legislation passed prior to the public vote.

MR. MILKS clarified that the only public vote that was legally effective was the vote on a constitutional amendment. He pointed out that HB 73 had a provision pertaining to an advisory vote, which would not create law.

MR. BARNHILL resumed the presentation on slide 4, which reviewed the mechanics of HJR 7. He explained that the proposed resolution would transition the permanent fund to a single, protected account. It would also add the percent of market value (POMV) distribution method to the constitution. He noted that in 2018, the legislature statutorily enacted a POMV formula in Senate Bill 26, which applied the distribution percentage to a lagging five-year market average of the permanent fund. He defined a "lagging five-year average" as the first five of the last six years. Further, under this proposal the legislature would be responsible for specifying a distribution percentage; the legislature would also have the authority to fix that distribution percentage by statute. He added that ultimately, enshrining that percentage in a constitutional measure could be accomplished at the legislature's discretion. He conveyed that HJR 7 would establish the PFD in the constitution by specifying that a percentage of the POMV distribution must be allocated to the dividend. He reiterated that the governor was proposing to leave the specification of that percentage to the legislature to

enact by statute. Alternatively, in HB 73, the governor proposed that the legislature enact a 50 percent allocation to the PFD. He further noted that the proposed resolution [HJR 7] would require a vote of the people to approve any change to the PFD program.

4:12:35 PM

CHAIR KREISS-TOMKINS questioned whether DOL was of the opinion that with passage of HJR 7 as written, the statutory formula, whatever it may be, shall be appropriated and supersede the legislature's "subjective desires for appropriation."

MR. BARNHILL deferred to Mr. Milks.

MR. MILKS remarked that as drafted, HJR 7 specified that a portion of the appropriation from the permanent fund shall be allocated for the PFD. Further, Section 2, subsection (c), stated that the amount allocated for the dividend shall be provided by law.

CHAIR KREISS-TOMKINS said he understood the language in the proposed resolution. He asserted that he was looking for a direct answer to a direct question: whether DOL was of the opinion that the formula was constitutionally guaranteed and effectively superseded the legislature's constitutional right to appropriate an amount other than the formula.

MR. MILKS said, "that is what HJR 7 provides in Section 2."

CHAIR KREISS-TOMKINS asked for confirmation that Mr. Milks and DOL believed that "that is what would happen constitutionally."

MR. MILKS replied that's how HJR 7 was drafted. He suggested that it was consistent with Wielechowski v. State of Alaska, in which the court decided that without a constitutional amendment, the PFD amount would be decided by the legislature.

CHAIR KREISS-TOMKINS asserted that he had not heard a direct answer to his question. He pointed out that the language in the proposed resolution was not as specific as a constitutional amendment that were to provide for the dividend formula. He asked if the broader language in HJR 7 would constitutionally guarantee whatever formula was in statute, thus superseding the legislature's constitutional right to appropriation.

MR. MILKS answered yes, this constitutional [resolution] (indisc.) the dividend and shall provide for a portion of the amount to the dividend.

4:17:12 PM

REPRESENTATIVE VANCE, referring to the language "as provided by law" in Section 2, subsection (c), asked whether that provision would be satisfied "if the legislature chose to come up with a number as an appropriation."

MR. MILKS explained that "by law" referred to a statute, not a law that was enacted as an appropriation bill, as specified in Section 3, subsection (d), of HJR 7.

4:18:45 PM

MR. BARNHILL continued the presentation on [slide 5] and outlined considerations for a distribution percentage in regard to HJR 7. He relayed that the permanent fund was "manually" inflation proofed through an annual appropriation from the ERA to the Principal, which was calculated by a statutory formula. However, in a modern one-account structure, such as an endowment, the inflation proofing would occur through a distribution percentage. Slide 5 read as follows [original punctuation provided]:

- Legislature establishes the distribution percentage in statute
  -POMV is currently 5% of the lagging 5-year average market value
- Limits spending while allowing the fund to grow to keep up with inflation
- Spend only the real return over time.
  -Example:
  - Total return: 7%
  - Inflation: 2%
  - Real return: 5%
- Liming spending to 5% inflation-proofs the Permanent Fund.

MR. BARNHILL explained that the real return was calculated by subtracting annual inflation from total return. In modern institutional fund practice, inflation proofing was accomplished by only spending the real return while retaining the inflation return, thus preserving the growth associated with inflation.

He emphasized that inflation could change over time and returns could be volatile. He reported that the permanent fund's real return and spending rate varied over time; however, for most years, the spending rate was less than the real return, which indicated growth. He noted that in HJR 7, the governor proposed that the distribution percentage could be statutorily adjusted by the legislature to prevent overspending from the fund. He pointed out that the inherent flexibility in HJR 7 was similar to HJR 1, which used the phrased "not more than 5 percent." That language would allow the legislature to monitor the rate of spending versus the rate of return and prevent the fund from erosion by inflation, he said.

4:23:50 PM

REPRESENTATIVE TARR, returning to Section 2, subsection (c), inquired about the timing in which the legislature was relayed the total return and inflation rates. She understood that those rates were assessments of economic conditions that were typically received "after the fact."

MR. BARNHILL indicated that there was an established practice of using the lagging five-year market average; consequently, when entering a budget cycle, it was clear what the formula was proposing with respect to spending. He suggested that the lagging five-year rolling return could be used to determine whether it was under or over the spending level. He added that his overarching recommendation was to keep an eye on things by reporting these figures annually.

REPRESENTATIVE TARR observed that a reporting requirement, which was absent from the current language, could which be a friendly inclusion to strengthen the proposal.

MR. BARNHILL acknowledged that it could be included in statute. He noted that the effective rate of spending had been presented to the House Special Committee on Ways and Means. He maintained that he was discussing these figures to emphasize to policy makers that this was the method to avoid eroding the fund by inflation.

4:26:59 PM

REPRESENTATIVE VANCE asked why five percent was the appropriate POMV rate for the fund's long-term sustainability.

MR. BARNHILL conveyed that the governor proposed 5 percent as a starting place with an expectation of continued discussion. He explained that 5 percent was standard in the world of endowments, institutional funds, and foundations. He noted that in foundations, 5 percent was hardwired into the internal revenue code to maintain tax exempt status. He understood that 5 percent was raising some anxiety because there was concern that the current bull market would settle, and it could be harder to accomplish a real return of 5 percent. He assured members that 5 percent was currently sound and that investments had been "phenomenal" this year.

REPRESENTATIVE VANCE inquired about 5 percent in relation to the tax-exempt status.

MR. BARNHILL clarified that he did not intend to imply that the permanent fund was subject to the internal revenue code laws on foundations. He explained that the permanent fund was tax exempt on the grounds of being a state fund. He noted that there had been three opinions rendered by outside counsel in the past 30 years, all of which had affirmed that tax exempt status.

4:30:47 PM

CHAIR KREISS-TOMKINS inquired about policy calls that could jeopardize the permanent fund's tax-exempt status.

MR. BARNHILL offered to follow up with the requested information. He recalled that the last opinion, which was rendered in 2003 by the law firm of Steptoe & Johnson, indicated that the permanent fund would be tax exempt as long as it was managed as a state fund.

CHAIR KREISS-TOMKINS asked whether the administration would be opposed to a lower POMV draw of 4.5 percent in statute or in the constitution. He relayed that a more restrictive draw would

MR. BARNHILL declined to comment on behalf of the administration. He recommended treating the present and the future as equally as possible. Therefore, by growing the fund at the rate of inflation, today's beneficiaries would have the same access to the fund as the beneficiaries of tomorrow. He emphasized that the the notion of intergenerational equity was important to endowments and cautioned against anything that would "hardwire" underspending of the fund to save for the future.

4:34:46 PM

MR. MILKS, in response to a question from Representative Eastman, said the process proposed in HJR 7 would provide for one way in which the permanent fund distribution could be changed: a law passed by the legislature that was then affirmed by a majority of voters.

REPRESENTATIVE EASTMAN clarified that he was asking about calculating the amount for the dividend amount and whether that could be passed through a ballot measure.

MR. MILKS explained that [subsection (b)] in Section 2 of HJR 7 would set a POMV draw from the permanent fund, as provided by law; subsection (c) of Section 2 specified that a portion of that amount would be allocated for dividend payments, as provided by law; subsection (d) of Section 2 further specified that changing the amount allocated for dividend payments would require a law passed by the legislature that must then be approved by voters. He summarized that the proposed resolution offered a unique process to change the allocation regarding dividends involving legislation then confirmation by voters.

REPRESENTATIVE EASTMAN stated that his constituents periodically suggested "[taking] the permanent fund and ... [paying] it out to Alaskans and be done with the whole permanent fund and dividends, etcetera." He asked if this resolution were to pass, how that idea could be achieved.

MR. MILKS said that concept would still require a constitutional amendment if HJR was adopted.

4:38:10 PM

REPRESENTATIVE EASTMAN considered a scenario in which 32 legislators voted to set the percentage at 100 percent and designated the entirety to dividends. He questioned what would stop that situation from happening.

MR. MILKS acknowledged the resolution provided that an amount of the POMV may be appropriated and that the POMV would be set by law. Additionally, it would require that an amount of that sum be paid in dividends, as provided by law. He reiterated that a change would require the voters' approval.

MR. BARNHILL in response to Representative Eastman, pointed out that the constitution utilized the word "permanent," which must

mean something, he said. Secondly, he touched on the emerging concept of prudent spending, noting that Representative Eastman's suggestion would fall into the realm of imprudent spending. He resumed the presentation on [slides 6] and explained that HB 73 would implement HJR 7 by setting the statutory POMV at 5 percent and the statutory PFD allocation at 50 percent. The bill would also schedule an advisory vote on the PFD formula to be held 90-120 days after adjournment. He noted that HB 73 would stand on its own without the passage of HJR 7.

4:41:56 PM

REPRESENTATIVE VANCE returned to subsection (b) in Section 2 of HJR 7, which stated that "the legislature may appropriate from the permanent fund to the general fund an amount as provided by law". She asked what would occur if the legislature chose not to appropriate from the permanent fund to the general fund, as subsection (c) specified that there "shall" be an allocation for dividends.

MR. BARNHILL deferred to Mr. Milks. Nonetheless, he questioned whether the legislature would ever find themselves in that scenario.

MR. MILKS acknowledged that page 2, line 1, states that the legislature "may" appropriate from the permanent fund while line 6 states that a portion "shall" be appropriated for dividend. He concluded that if any money came from the permanent fund, a portion shall be allocated for dividends.

CHAIR KREISS-TOMKINS understood that despite the unlikely scenario, the administration had confirmed that it would be an elective decision.

MR. BREFCYNSKI said despite the wording, it was not the governor's intent that the dividend would be elective. He added that the administration was fully prepared to engage in conversations about amending that language if necessary.

4:44:56 PM

REPRESENTATIVE VANCE requested a fiscal model of the fund's potential growth under this proposal to understand its economic impact.

MR. BARNHILL said he would be happy to prepare that for the committee.

4:45:55 PM

CHAIR KREISS-TOMKINS announced that HJR 7 and HB 73 were held over.

^#hb5

HB 5-SEXUAL ASSAULT; DEF. OF "CONSENT"

4:46:07 PM

CHAIR KREISS-TOMKINS announced that the final order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 5, "An Act relating to sexual abuse of a minor; relating to sexual assault; relating to the code of military justice; relating to consent; relating to the testing of sexual assault examination kits; and providing for an effective date."

4:47:08 PM

The committee took an at-ease from 4:47 p.m. to 4:51 p.m.

4:51:37 PM

CHAIR KREISS-TOMKINS noted that there were experts available to answer questions pertaining to criminal law and rape kits. After ascertaining that there were no immediate questions from committee members, he stated that in Alaska, the legal age of marriage was 16 or younger with the proper authorization.

4:52:33 PM

REPRESENTATIVE TARR, prime sponsor of HB 5, interjected to note that for 16- and 17-year-olds, marriage required written parental consent. Marriage involving 14- or 15-year-olds required written parental consent, as well as a court hearing in which the parents and the minor child were involved. Permission from the Superior Court was also required in addition to proof that the marriage was in the best interest of the minor. She reiterated for purposes of the proposed legislation, that 16- and 17-year-olds could get married with written parental consent.

CHAIR KREISS-TOMKINS in regard to statutory rape, questioned whether it mattered if the individuals were married.

REPRESENTATIVE TARR understood that sexual assault laws applied to married couples. She explained that HB 5 included a provision to account for [sexual assault] involving, for example, a 16-year-old and a 27-year-old who were unmarried.

CHAIR KREISS-TOMKINS asked Mr. Skidmore to comment on the age of consent versus age of marriage in Alaska.

4:55:14 PM

JOHN SKIDMORE, Deputy Attorney General, Office of the Attorney General, Department of Law, in response to Chair Kreiss-Tomkins, said he agreed with Representative Tarr's analysis. He explained that in terms of consent, marriage wasn't a factor in regard to sexual assault laws. Alternatively, he speculated that when considering statutory rape of a minor - also referred to sexual abuse of a minor (SAM) - [marriage] might only be a factor if the age difference between the two individuals was more than 10 years, should the bill pass. He added that was unsure whether marriage would be an exception under those circumstances.

CHAIR KREISS-TOMKINS requested that Mr. Skidmore follow up with information on whether a marital exemption exists legally.

4:56:47 PM

JAMES STINSON, Director, Office of Public Advocacy, Department of Administration, understood that there was not a specific provision for SAM statutes. He noted that there could be an affirmative defense made for consensual sexual activity within a marriage in that age range; however, he maintained that one did not currently exist for SAM charges.

4:57:39 PM

REPRESENTATIVE EASTMAN questioned whether marriages from other states or jurisdictions with a lower age of consent were recognized in Alaska.

MR. SKIDMORE answered yes, marriages from other states were recognized in Alaska; however, he divulged that it was not an area of law that he was explicitly familiar with.

4:58:36 PM

REPRESENTATIVE CLAMAN sought to confirm that Mr. Stinson had said that there was no marital defense for a SAM charge at this time.

MR. STINSON confirmed to the best of his knowledge.

4:59:33 PM

RENEE MCFARLAND, Deputy Public Defender, Public Defender Agency, Department of Administration, stated that AS 11.41.445 made marriage an affirmative defense for the purposes of the SAM statute if the victim was the legal spouse of the defendant unless the offense was committed without the victim's consent.

REPRESENTATIVE CLAMAN sought to confirm that sexual relations between a 17-year-old and a 30-year-old would be a crime unless they were married.

MR. SKIDMORE confirmed [that before the marriage it would be a crime and after they were married it would not].

REPRESENTATIVE CLAMAN asked for verification that a marriage in another state at the age of 16 would be valid in Alaska for the purposes of this affirmative defense.

MR. SKIDMORE sought to confirm that Representative Claman had asked whether the affirmative defense would be recognized for ages 16 and 17.

REPRESENTATIVE CLAMAN confirmed.

MR. SKIDMORE answered yes, [that that the affirmative defense would be recognized for a 16-year-old and a 17-year-old.]

5:02:05 PM

REPRESENTATIVE VANCE asked for confirmation that the bill was proposing "that anything less than 10 years with a minor under the age of 18 would no longer be considered statutory rape."

MR. SKIDMORE attempted to clarify the question.

REPRESENTATIVE VANCE inquired about the statutory rape statutes.

MR. SKIDMORE explained that SAM statutes indicated that minors did not have the ability to consent at age 13, 14 or 15 when there was a certain age gap between the offender and the victim.

For those minors (ages 13, 14, or 15), the proposed legislation would make it a higher-level offense when the age gap between the victim and the offender was 10 years; additionally, with a 10-year age gap between the victim and the offender, the bill would add a conduct if the victim was 16 or 17.

CHAIR KREISS-TOMKINS concluded that in present law, a 16-year-old could have consensual sex with a 26-year-old (or someone older) and a 17-year-old could have consensual sex with a 27-year-old (or someone older); however, should the bill pass, those sexual relations would constitute SAM in the first degree.

5:05:08 PM

REPRESENTATIVE VANCE requested a visual representation of present statutes compared to the proposed legislation to better understand the implications of the bill.

REPRESENTATIVE TARR directed attention to Section 4, paragraph (1), on page 3, lines 27-31 of SSHB 5. She explained that for ages 13, 14, and 15, the bill would increase the "penalty" if the age gap [between the victim and the offender] was 10 or more years. Additionally, for 16- and 17-year-old victims, the bill would create a crime when the age gap between the victim and the offender was 10 or more years.

CHAIR KREISS-TOMKINS pointed out that there could be scenarios in which a 17-year-old and a 27-year-old were in a consensual sexual relationship. He understood that SAM 1 was an unclassified felony with a minimum of 20 years in prison; therefore, per previous conversations about rates of incarceration and "proportionality," he said he wanted to flag that as an area that was slightly concerning.

REPRESENTATIVE TARR said in regard to the sentencing ranges, she was trying to work with a number of organizations to balance victims' rights against offenders' rights. She relayed that on average, perpetrators of child sexual abuse had more than 100 victims; further, that there was no standard for effective treatment. She added that reoffending and recidivism was common for sex offenses. She stated that the level of harm was troubling and expressed her hope that as a result of changing the laws, high-frequency perpetrators would be incarcerated.

5:11:30 PM

REPRESENTATIVE CLAMAN sought to confirm that presently, a 16- or 17-year-old could legally engage in sexual relations with a 30-year-old.

MR. SKIDMORE replied yes, as long as the sexual conduct was consensual. He added that no SAM statute specified that a 16- or 17-year-old could not consent.

REPRESENTATIVE CLAMAN inquired about DOL's position on the bill in its current form.

MR. SKIDMORE said DOL was neutral.

REPRESENTATIVE CLAMAN asked whether there had been any research on the potential impact of this bill on Native communities, which were already overrepresented in the Department of Corrections (DOC).

REPRESENTATIVE TARR answered yes, she explained that she had worked closely with Alaska Native women in drafting the proposed legislation to reflect their experiences. More recently, she reported working with the Alaska Native Justice Center, as well as the Alaska Network on Domestic Violence and Sexual Assault. She maintained that the goal was to listen to survivors and incorporate their personal experiences in balance with the criminal justice system response.

REPRESENTATIVE CLAMAN said he appreciated that response, but it lacked statistical data on the real overrepresentation of minority communities in Alaska's jails. He asked a statistical analysis on how the bill would impact the prison population.

REPRESENTATIVE TARR stated that she did not, as she did not possess the resources to conduct such research. She maintained that her strong support for human rights and survivors was always reflected in the legislation she sponsored.

5:14:34 PM

REPRESENTATIVE VANCE inquired about the percentage of sexual assault offenders in DOC facilities. She reported that at least 59 percent of Alaskan women had experienced violence in an intimate relationship. She relayed that her constituents would want to exercise the full extent of the law against sexual assault crimes especially against children. She opined that Alaskans were not thinking about the prison "capacity" when it

came to justice for crimes against children. She urged her fellow lawmakers to take those beliefs into account.

CHAIR KREISS-TOMKINS asked Ms. Meade to estimate the percentage of inmates that were incarcerated in Alaska correctional facilities for crimes of sexual misconduct.

5:16:53 PM

NANCY MEADE, General Counsel, Office of the Administrative Director, Alaska Court System, declined to estimate that figure and deferred the question to DOC.

REPRESENTATIVE VANCE questioned the percentage of sexual crimes, either fully prosecuted or not, that came through the courts.

MS. MEADE offered to follow up on the number of sexual misdemeanors and felonies that were filed.

5:17:51 PM

REPRESENTATIVE CLAMAN explained that his prior request for data stemmed from apprehension about the consistently increasing prison sentences without any meaningful benefit in terms of public safety. He expressed his concern about the impending impacts on minority communities. He acknowledged Representative Vance's comments and the importance of imposing "no mercy" against some crimes; however, he recalled his experience in rural communities where the threat of 15- or 20-year sentences factor into people's unwillingness to come forward. He conveyed apprehension about the idea of incarcerating a 30-year-old who was engaging in consensual sex with a 17-year-old and sending him/her away for a minimum of 20 years on an unclassified felony. He reiterated that he asked the data related questions to better understand the impact that these decisions would have. He maintained his belief that the intention of the proposed legislation was well placed, but he was not sure it would result in the desired effect.

REPRESENTATIVE TARR said she agreed with Representative Claman and Representative Vance. She recalled that when she initially presented the legislation, she had questioned the appropriate "criminal justice response" and the appropriate length of incarceration to no longer cause harm. She said she was not capable of answering that alone or hearing the stories of human suffering. She reiterated that she was asking for help and emphasized that she would be receptive to ideas. She further

noted that she had considered a sentence of 7-10 years for first-time offenders. She expressed her hope that as a woman who had never felt safe living in Alaska, the legislature would give the proposed legislation serious consideration and evaluate the human rights of everyone involved.

5:22:57 PM

CHAIR KREISS-TOMKINS asked Mr. Skidmore to speak to the data on declined prosecutions and why they occur; additionally, he asked to what extent an insufficient definition of consent was a factor.

MR. SKIDMORE said he did not know the rate of declinations; however, the vast majority of declinations were due to insufficient evidence, he reported. He explained that much of that was associated with the nature of sexual assault, where they occur, and the type of evidence that was generally available. He opined that changing the definition would not change the ability to accept a significantly higher number of cases for evidentiary reasons; nonetheless, it would allow cases that had been declined as a result of "a lack of use of force or coercion" to be accepted. He shared his belief that it would be challenging to provide a statistic analysis of how [the proposed legislation] would increase cases, noting that the same challenges would continue to exist because many sexual assaults occur between two individuals only; therefore, changing the definition would not likely change the evidence of consent that's available. He added that despite the continuous challenges, [DOL] was working on ways to improve investigatory practices and prosecutorial training. He concluded by reiterating that sexual assault would continue to be a difficult crime to prosecute.

CHAIR KREISS-TOMKINS sought to confirm that Mr. Skidmore had stated that the reason many prosecutions were declined was due to a deficit of evidence rather than the deficient definition of consent.

MR. SKIDMORE answered yes. He went on to explain that the numbers indicated that there was a significant difference in the number of cases reported to law enforcement compared to the number of cases referred to DOL. He added that he was unsure of whether the unrefereed cases were driven by the definitional problem or a lack of evidence. For that reason, he said he was hesitant to definitively quantify the proposed legislation's potential impact.

5:28:56 PM

REPRESENTATIVE CLAMAN understood that the present definition that had been applied by both by law enforcement officers and the prosecutor's office was based on the court analysis of the statute rather than the statutory language itself. He asked whether that was correct.

MS. MCFARLAND replied that she was not aware of many cases in which the court had strayed too far from the language in the statute. Further, she relayed that the court had read a requirement into the sexual assault statutes that the defendant recklessly disregard the lack of consent, which was not provided in the statute itself.

REPRESENTATIVE CLAMAN recalled hearing that the consent language focused the inquiry more on the victim and less on the offender by inviting the defense to raise questions about how the victim may or may not have communicated his/her consent or thereof in the past. He asked if the statute change would put more focus on the victim or the offender.

MR. SKIDMORE said he did not have a sense whether this would change how the defense bar sought to defend sexual assault cases. He opined that the issue of consent was a question of the perpetrator's assessment of that lack of consent; however, talented and creative defense attorneys could return to how that assessment was influenced by a victim's words or conduct. He said it would always be one of the issues involved in litigating these types of cases.

5:33:14 PM

REPRESENTATIVE CLAMAN asked whether the proposed changes to the consent law would put more focus on the victim compared to the current statute.

MS. MCFARLAND relayed that the Public Defender Agency believed that compared to the current definition, the proposed changes would switch the focus to the victim. She added that the present statute focused on the defendant's conduct of coercing the victim, whereas the proposed definition entails a freely given reversible agreement. She opined that switching from whether the defendant coerced the conduct to whether there was a freely given agreement would shift the focus from the defendant's conduct to the victim.

REPRESENTATIVE CLAMAN asked Ms. McFarland to illustrate her previous statement with a hypothetical scenario.

MS. MCFARLAND said it was hard to come up with a hypothetical on the spot because the proposed definition expanded the type of conduct that would fall under the statute.

REPRESENTATIVE CLAMAN directed the question to Mr. Stinson.

5:36:28 PM

MR. STINSON remarked:

> Currently, there's essentially the rape the shield statute which prevents impermissible evidence being admitted ... 'because a victim had sexual relations with certain people, they are therefore likely to have had sexual relations with the defendant' - that's impermissible. But evidence of a victim's prior sexual conduct is admissible if it's relevant to a material issue in the case. So, for example, if their individual relationship had a certain type of consent or certain types of ritual or habit - that might be admissible. I think when you're dealing with affirmative consent, there is at least the possibility that a creative attorney could make the argument that what they're seeking to admit is testimony from other people who may have been a partner of that person who had consent in a certain way from that victim. And, so, I think the argument there would be, we're not admitting this for the purpose of showing that because the victim had sexual relations with these other people that therefore, it's likely that she also consented to the defendant. ... 'For example, this person always wink, says these words, and does this, and that's their signal that they are ready to engage in relation.' If in a small community you had people that had testimony like that, I could see that there would be an argument before a trial court judge that the manner of affirmative consent is what you're seeking to admit and that its irrelevant because the defendant had awareness that that was the type of affirmative consent that that person gives and that it was the same type of affirmative consent given in the past. So, I can see an attorney making that type of

> arguments. ... I think that that is an example of how it potentially bends ... the rape shield law.

REPRESENTATIVE CLAMAN proposed a hypothetical scenario in which a person met another individual in a bar wherein they drank and danced "suggestively" before going back to one of his/her homes and engaging in [sexual] relations. The next night the same person engaged in similar conduct with a different person who had witnessed the actions of the prior night, which was followed by an allegation of nonconsensual sex. He asked whether this was the kind of scenario that Mr. Stinson had referenced.

MR. STINSON said Representative Claman's scenario would be more tenuous and would become fact specific about what actually happened after the bar. He explained that the scenario he [Mr. Stinson] had posed was alluding to a community reputation. He reiterated that these scenarios typically become fact specific and whether a trial judge would admit evidence of that would depend on those specific facts.

5:41:33 PM

REPRESENTATIVE VANCE asked whether the law was more inclined to lean on the victim's reputation or whether he/she gave consent.

MR. STINSON stated that the law was "absolutely designed" to look at whether or not the individual gave consent. He added that the purpose of the rape shield statute was to prohibit generalized evidence of somebody's "reputation" in the community. He explained that these scenarios were being examined on whether a pattern of specific types of affirmative consent would rise to a level of relevancy that a court could admit with a change in the law.

MR. SKIDMORE agreed with Mr. Stinson that the rape shield law was designed to protect against someone's reputation. As a prosecutor, he maintained that just because a person agreed to sleep with one person did not mean that they agreed to sleep with someone else. He continued to explain that just because an individual engaged in an activity, such as dancing, with one person, it could not be construed as consent. He concluded that this law was trying to convey that affirmative consent must be sought. Further, he believed that if this law were to pass, there would be more litigation around the rape shield statute and many defense lawyers would attempt creative arguments to admit different types of evidence. Whether or not courts admit it, he said, would be fiercely litigated.

CHAIR KREISS-TOMKINS asked if the legislature were to adopt a definition of affirmative consent for sexual relationships, how consent while given in an impaired state would be seen under the law.

5:45:45 PM

MR. SKIDMORE explained that he had not seen any case law suggesting that intoxication created the inability to consent. Nonetheless, he said it was possible to drink to the point in which someone was not capable of consenting. He added that the law examined when a person became incapacitated from the level of intoxication. Further, he said he was unsure how the courts would ultimately interpret this issue in terms of the proposed definition of freely given consent. He maintained he could not imagine that simply because one person had one or two drinks of alcohol, that he/she was incapable of consenting. He conveyed that it was still incumbent upon the defendant to recklessly disregard a substantial and unjustifiable risk that there was not consent. He defined reckless as "the disregard of a substantial and unjustifiable risk that that circumstance exists." He further noted that recklessness in its definition was from the perspective of the sober person; therefore, if the defendant was intoxicated, they were still evaluated from the standpoint of a sober person.

5:48:23 PM

CHAIR KREISS-TOMKINS sought to confirm that Mr. Skidmore had suggested that if an individual had been drinking and gave consent, the courts would adjudicate where the line was between incapacitation, which would constitute sexual assault, and freely given consent. He asked whether that was a fair summary.

MR. SKIDMORE confirmed. He added that at some point, courts would provide guidance to the jury, which allowed them to decide on whether the facts as they were presented met the elements of the offense.

CHAIR KREISS-TOMKINS asked Mr. Stinson how intoxication would relate to freely given affirmative consent.

MR. STINSON agreed with Mr. Skidmore that if intoxication did not amount to incapacitation, the individual should be able to give consent; however, he noted that there could be fact-specific scenarios that cause pause.

CHAIR KREISS-TOMKINS inquired about "sex with an incapacitated person" under current law.

MR. STINSON believed that sexual assault [in the second degree] was a class A felony; therefore, engaging in sexual relations with an individual who was asleep or incapacitated was illegal and considered sexual assault.

REPRESENTATIVE TARR pointed out that Section 5, paragraph (1), of SSHB 5 was intended to address Representative Claman's line of questioning regarding the rape shield law, as referencing an individual's "reputation" was often how survivors were attacked in the court room.

5:53:05 PM

CHAIR KREISS-TOMKINS considered a scenario in which a married or unmarried couple had a healthy, consensual relationship. He asked how those cases would be treated when there was no word or action of affirmative consent, but it was a consensual sexual encounter between the two individuals.

MR. SKIDMORE said the bill was written to consider words, conduct, and the totality of the circumstances. He believed that those factors in addition to the previous relationship, conduct, and understanding between the individuals would all play into whether there was a substantial and unjustifiable risk that there was not consent in that particular circumstance. He reiterated that all of that would be taken into consideration and should be able to protect against a misunderstanding. He opined that those considerations would also make some cases more difficult for prosecution to prove; nonetheless, he believed it was the only way that this could truly be approached from both a policy and a legal perspective.

MR. STINSON conveyed some concern from the defense perspective that adding "specific to the conduct at issue" and the additional definition of "freely given" would compartmentalize each sexual contact or separate the course of sexual conduct. He said it seemed to suggest that a positively expressed word or action would be necessary for every step of the way. He concluded that the defense perspective was fearful of whether normative sexual conduct could be captured. He remarked:

> I understand that you would still have a reckless mental state. I guess the question I would pose is

> that if it has to be specific to the conduct at issue and if it has to be positively expressed by word or action then, I think, it's difficult at least on paper to say that you wouldn't be reckless going up and having sexual contact with somebody without a positively expressed word or action because it's specific to the conduct at issue.

MR. STINSON said he would be happy to hear Mr. Skidmore's perspective as to whether it would be a reckless action by default to ever presume consent, even within the context of a relationship, arguably.

MR. SKIDMORE understood the concept expressed by Mr. Stinson; however, he said he fundamentally disagreed on the basis that within a relationship with that level of consent, the individuals typically knew that certain things were okay. He conveyed that he had difficulty imagining a situation involving two people in a long-term relationship being submitted to law enforcement and prosecutors, or that a jury would find beyond a reasonable doubt that there wasn't affirmative consent by words or conduct due to the history that would be found within that relationship. Nonetheless, he said that issue had been a topic of conversation amongst prosecutors.

6:00:18 PM

CHAIR KREISS-TOMKINS questioned how the history of a healthy, consensual relationship would be taken into account if that was not allowable with the rape shield law.

MR. SKIDMORE explained that the rape shield law protected against bringing in instances of sex with a different person. He reiterated that the rape shield law was intended to protect against the assumption that just because an individual had been willing to engage in sexual conduct with one or more partners, he/she was willing to engage in sex with literally anybody. He argued that he could find a case that allowed previous sexual conduct between the same people to be deemed relevant in a case of sexual conduct.

6:02:14 PM

REPRESENTATIVE CLAMAN returned to the topic of intoxication. He referenced AS 11.81.630, as well as the definition of "knowingly" in AS 11.81.900(a)(2) and "reckless" in AS 11.81.900(a)(3), all of which were focused on intoxication as a

defense raised by the defendant. He sought to confirm that that the defendant was considered as if he/she was sober. He asked whether that was correct.

MR. SKIDMORE replied in the affirmative. He explained that in considering intoxication as a defense, the focus was on how intoxication impacted the defendant's ability to form the required "mens rea," or mental element. Further, he was unsure how the question of whether intoxication or any consumption of alcohol would impact a victim's ability to provide consent would be answered.

REPRESENTATIVE CLAMAN clarified that he was not asking about the extreme scenarios in which an individual may have been on the margin of being able to give consent because of the level of intoxication. He inquired about someone who was considered a "happy drunk" and whether that would be meaningful in whether that person would be able to give consent.

MR. SKIDMORE answered yes, both the level of the victim's intoxication and whether he/she was consenting in that circumstance would be considered. He said he did not see anything that would suggest that simply because that person had been drinking that it took away his/her ability to consent.

CHAIR KREISS-TOMKINS asked Mr. Stinson to comment from the defense bar perspective.

6:06:52 PM

MR. STINSON agreed with Representative Claman that it was designed to prevent a defendant from arguing that a mental state was not met due to intoxication, which only happened with specific intent crimes. He explained that while he agreed with Mr. Skidmore that there was not a legal bar for the victim to consent in that scenario, the defendant would be looked at potentially as a sober person and whether he/she consciously disregarded the substantial and unjustifiable risk that there was not affirmative consent. He concluded that a "happy drunk" who was not incapacitated could give consent; further, a defendant would not be able to use intoxication as any kind of defense for misperceiving consent.

MS. MCFARLAND opined that the proposed legislation would likely increase the amount of litigation in these cases, as it would present many questions about what it means to consent and how intoxication plays into that.

6:10:39 PM

MS. MCFARLAND in response to a question from Representative Claman, stated that the state would consider the conduct at the time and would have to prove that there was not consent and that that the defendant recklessly disregarded that consent.

REPRESENTATIVE TARR pointed out that the fiscal notes indicated that the proposed legislation would result in additional litigation. Further, she emphasized that women were not included in the process of drafting the current laws [regarding sexual assault] nor were they involved in the consideration of this policy. Additionally, as a disproportionate number of survivors were women, she said she wanted to make sure that their voices were not lost. She believed that women wanted affirmative consent because in the current form of the law, their right to consent had already been taken away. She referenced the 50-60 letters of support and opined that the proposed legislation should advance in the interest of public safety.

6:13:30 PM

CHAIR KREISS-TOMKINS believed that members were united on the desired outcome; however, he wanted to ensure that he was confident in understanding the framework when considering legislation that involved changes to criminal law. He noted his appreciation for the passion Representative Tarr had given to this issue for many years.

REPRESENTATIVE TARR further clarified that in the possibility the legislative record would be looked to in future litigation regarding the definition of affirmative consent, the intent was not to require a verbal agreement for each [compartmentalized] act during a sexual encounter. She added that words, actions, and the totality of the situation were intended to be included.

6:15:09 PM

CHAIR KREISS-TOMKINS directed the following question to Mr. Stinson:

> If you have a couple in a healthy consensual relationship and ... one person is looking to initiate a sexual encounter and ... they put their hand on the other person in a sexual manner, which falls within

> the scope of some of the sexual misconduct laws in the hopes of initiating ... sex. How do you look at that in terms of [whether that would fall] within the definition of sexual misconduct and affirmative consent framework and where are the lines?

MR. STINSON acknowledged that the legislative perspective was helpful to state on the record because the goal was not to criminalize normative sexual behavior. That being said, he expressed concern that within the affirmative consent framework, the ultimate goal was to ensure that one party wouldn't have to do something to express the fact that he/she was not consenting; instead, he/she would have to do something that would [affirmatively] express consent. He explained that in looking at a normative sexual relationship between two people, they may without initiate sexual contact without any prompting or consent specific to the conduct at issue. He said typically, within those types of relationships, a person would either respond positively or negatively. At that point, in a committed relationship, even sexual contact could rise to the level of criminality if an indication to stop was not listened to. He maintained that the defense was concerned that a plain reading of the proposed legislation could be interpreted counter to the legislature's desired outcome. He continued to convey that the definition of affirmative consent in the bill seemed to suggest that there would have to be some initiation on the part of the person receiving the sexual contact or sexual advance. He concluded that ultimately, deciding whether to further clarify that language would be a policy call on behalf of the legislature. Additionally, he surmised that the "conduct at issue" was included in the legislation to capture the scenario in which a person did not give expressed consent, nor did he/she resist or say "stop." He said it would also be up to lawmakers to decide what responsibility, if any, would be on another party to object to a course of sexual contact at a given time.

6:20:36 PM

REPRESENTATIVE STORY expressed her appreciation for the discussion and shared her belief that something had to be done about the definition [of consent]. She expressed her hope that the committee would continue its work on the proposed legislation to ensure that everyone was comfortable with the final product.

REPRESENTATIVE CLAMAN observed that sometimes hearings raise more questions than answers. He said he would prefer the opportunity to follow up and reflect on some of these questions.

REPRESENTATIVE VANCE asked Representative Tarr why the language "competent person" and "may be reversed at any time for any reason" was not included in the bill.

REPRESENTATIVE TARR stated that the original definition [of consent] included "by a competent person;" however, the language was removed after conversing with DOL about the statutory redundancy of mental state, which was addressed in sexual assault in the second degree, she relayed. She explained that "reversible" was included in the definition to maintain consistency with the current education regarding consent. She said the goal was to utilize the right language to allow for effective prosecution of sexual assault crimes; therefore, if "specific to the conduct at issue" would be legally problematic, it shouldn't be included.

6:27:04 PM

CHAIR KREISS-TOMKINS announced that HB 5 was held over.
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6:28:21 PM

ADJOURNMENT

There being no further business before the committee, the House State Affairs Standing Committee meeting was adjourned at 6:28 p.m.